

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. Y-08/13-636
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL) denying his request to expunge from its Vulnerable Adult Abuse/Neglect/Exploitation Registry a report from 2009 that the petitioner financially exploited his mother. The issue is whether the Department abused its discretion in denying the petitioner's request for expungement.

PROCEDURAL HISTORY

On May 20, 2009, DAIL sent a letter to the petitioner notifying him of its intent to substantiate him for neglect and exploitation of his elderly mother. Pursuant to the letter, the petitioner requested a Commissioner's review, which was held on June 24, 2009. Following the review, the Commissioner upheld the decision to substantiate and the petitioner timely appealed that decision to the Human Services Board.

Following a de novo hearing held on February 2, 2010, the Board, in a decision entered on April 9, 2010, upheld DAIL's decision to substantiate the petitioner for exploitation of a vulnerable adult. On April 21, 2010, the petitioner appealed the Board's decision to the Vermont Supreme Court.

At or near the same time the petitioner also requested that the Board reopen his case to submit additional, enumerated documents which he claimed would exonerate him. In an Order entered On July 12, 2010, the Board denied the petitioner's request on the ground that all of the proffered evidence had already been considered as part of the original determination.

The Supreme Court heard the petitioner's appeal, and in a decision filed on April 21, 2011 it upheld the decision of the Board ruling that his claims were without merit. The Court rejected challenges the petitioner had made to the constitutionality of the statutes and the method by which fair hearings were conducted as being untimely as they were not raised below. The Court concluded that the petitioner had received ample due process to challenge DAIL's decision to substantiate. *In re Marvin Waldman*, Supreme Ct. Dkt. No. 2010-441 (April Term 2011).

More than two years later, on July 24, 2013, the petitioner wrote to DAIL asking to expunge the substantiation. He stated as grounds therefore that he had not been adequately notified *in 2009* of the possible uses of the substantiation as required by statute.

On July 29, 2013, DAIL notified the petitioner that a Commissioner's hearing would be scheduled for him on August 14, 2013. On August 2, the petitioner notified DAIL that he did not request a hearing and asked that DAIL provide him with the original letter of substantiation. The petitioner stated that following the receipt of the letter, he would determine if he wished to have a hearing.

August 28, 2013 the petitioner appealed to the Board complaining that he had not received a timely response to his August 2, 2013 request for a copy of the substantiation letter. He asked for a hearing to expunge his substantiation saying that DAIL had not given him sufficient notice in 2009 of the legal uses of the substantiation as required by statute.

On September 5 2013, DAIL provided a response saying that it had sent the petitioner a copy of the requested letter and again offering him a review hearing. In the letter, DAIL notified the petitioner that in an expungement

hearing the underlying allegation that led to the substantiation is not at issue but could be discussed as part of the overall expungement decision.

On October 3, 2013, DAIL held a review hearing on the petitioner's request for expungement. At his request, the petitioner submitted his arguments in writing. In a decision dated October 31, 2013 DAIL denied the request for expungement on the basis of the procedural issues raised by the petitioner related to DAIL's 2009 decision and the lack of any showing by the petitioner that he had addressed the factual issues underlying his 2009 substantiation.

On November 10, 2013, the petitioner notified the Board that there were no facts in dispute on his expungement request, and he asked to submit his arguments in writing. At a telephone status conference held on November 14, 2013, the hearing officer established a briefing schedule.

On December 24, 2013, the petitioner notified the Board and DAIL that he had a second ground for expungement, namely that there was a "lack of notice of a due process sufficient procedure to adjudicate the State's claims that I neglected or exploited a vulnerable adult." He demanded that DAIL expunge his substantiation based on this new theory.

On December 27, 2013 the petitioner filed his brief on the first issue. On January 6, 2014, DAIL responded to the petitioner's request to expunge on the second ground by offering him a Commissioner's hearing, which it appears the petitioner has eschewed.

On January 28, 2014, the petitioner notified the Board that he would be represented in this matter by another person who is not an attorney. On January 30, 2014, the petitioner filed his advocate's written arguments on the second issue, which the petitioner styled a "Motion to Amend Appeal".

At a telephone status conference held on February 3, 2014, the Department indicated it would file a written argument by the end of that week. The petitioner's advocate agreed that he would file any final response by March 21, 2014. The Department filed its argument on February 6, 2014. The petitioner filed a response by email on March 17, 2014. The ensuing discussion, recommendation, and reasons are based on all the written arguments submitted by the parties.

DISCUSSION

In his arguments the petitioner cites several specific licensing regulations prohibiting certain licensed institutions from having "substantiated persons" on their

staffs. He maintains that DAIL's 2009 notice to him only mentioned that these entities could have access to the registry, not that he would be barred from working at them. He maintains that this omission rendered the notices he received in 2009 deficient as a matter of due process, and that the resulting substantiation should now be expunged on this basis.

The petitioner also maintains that the Department's 2009 notices did not adequately notify him of the scope of the hearing that was held before the Board's hearing officer on February 10, 2010, i.e. that it was *de novo* and that the Department's burden of proof was by a preponderance of evidence standard. He argues that this deprived him of his due process rights during that appeal process, and that as a result his name should now be expunged from the registry.

There is no claim by the petitioner or indication in the record that the petitioner raised either of these issues before the Human Services Board or the Supreme Court in their respective considerations of his appeal in 2010 and 2011, or that he did not have the opportunity to do so at that time.

ORDER

The Department's decision is affirmed.

REASONS

Res judicata "bars the litigation of a claim or defense if there exists a final judgment in former litigation in which the parties, subject matter and causes of action are identical or substantially identical". *Lamb v. Geovjian*, 165 Vt. 375, 380 (1996); *Berlin Convalescent Ctr., Inc. v. Stoneman*, 159 Vt. 53, 56 (1992) (quoting *Berisha v. Hardy*, 144 Vt. 136, 138 (1984)). The doctrine does not require that claims must have been actually litigated in an earlier proceeding; rather, *res judicata* "bars parties from litigating claims or causes of action that were or should have been raised in previous litigation." *Merrilees v. Treasurer*, 159 Vt. 623, 624 (Vt. 1992). The doctrine of claim preclusion rests on the "fundamental precept that a final judgment on the merits puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Faulkner v. Caledonia County Fair Assoc.*, 2004 VT 123 (citations omitted).

In this case, in its 2011 decision affirming the Board's prior decisions in the matter, the Supreme Court noted: "Petitioner was provided ample due process by which to challenge this conclusion (that he financially exploited his mother), and the fact that he disagrees with the Board's

decision does not demonstrate legal error or violation of his constitutional rights. We have considered all of the petitioner's arguments and find them all without merit." *Id.* at p.2.

33 V.S.A. § 6911(e) provides: "A person may at any time apply to the department for expungement of his or her name from the registry. The petitioner shall have the burden of showing why his or her name should be expunged from the registry." This provision does not contemplate or require that the Department (or the Board) grant persons who have been placed in the vulnerable adult abuse registry a fresh review (or series of reviews) based solely on allegations of recently "discovered" procedural and legal issues that could (and should) have been raised at the time of the original proceedings. At this point, the petitioner has not availed himself of the opportunity offered by the Department to put forward any facts or personal circumstances that may have occurred *subsequent to 2009* which might show that he should *now* be removed from registry. The Board is thus bound to affirm the Department's decision not to expunge his name from its registry. 3 V.S.A. § 3091(d), Fair hearing Rule No. 1000.4D.

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